

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GRANDVILLE LEE MASSEY a/k/a
GRANDVILLE MASSEY,

Defendant-Appellant.

UNPUBLISHED

January 11, 2002

No. 214420

Oakland Circuit Court

LC No. 94-135059-FH

ON REMAND

Before: Cavanagh, P.J., and Talbot and Meter, JJ.

PER CURIAM.

This case is before us on remand from the Supreme Court. Following a jury trial, defendant was convicted of possession with intent to deliver 225 grams or more but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii), conspiracy to commit that offense, MCL 750.157a, and possession of a firearm during the commission of a felony, MCL 750.227b. In our prior opinion, we affirmed defendant's convictions. *People v Massey*, unpublished opinion per curiam of the Court of Appeals, issued 01/02/2001 (Docket No. 214420). Defendant filed an application for leave to appeal with the Supreme Court. In lieu of granting leave to appeal, the Supreme Court remanded this case for our reconsideration in light of *People v Mass*, 464 Mich 615; 628 NW2d 540 (2001). On the authority of *Mass*, we now reverse defendant's conspiracy conviction and sentence and remand for further proceedings.

On remand, defendant filed with this Court a motion for leave to file a supplemental brief. We granted defendant's motion. In his supplemental brief, he argues that the trial court improperly instructed the jury with respect to the elements of the conspiracy charge. During deliberations, the jury submitted a question regarding the conspiracy charge asking whether it must find that defendant knew "the exact amount to be delivered or that the amount is in that range?" The trial court instructed the jury: "The amount need not be known to the Defendants. Only that there is a conspiracy to deliver and that the substance is cocaine. The subsequent determination of the amount determines the actual charge." Defendant argues that the trial court's instruction is contrary to *Mass*. We agree.

In *Mass*, the Supreme Court held that "knowledge of the amount of a controlled substance is an element of a conspiracy to deliver charge." *Mass, supra* at 618. The Court reiterated its holding in *People v Justice*, 454 Mich 334; 562 NW2d 652 (1997):

. . . [T]o be convicted of conspiracy to possess with intent to deliver a controlled substance, the prosecution had to prove that (1) the defendant possessed the specific intent to deliver *the statutory minimum as charged*, (2) his coconspirators possessed the specific intent to deliver the statutory minimum as charged, and (3) the defendant and his coconspirators possessed the specific intent to combine to deliver the *statutory minimum as charged* to a third person. [*Mass, supra* at 629-630, citing *Justice, supra* at 349 (emphasis in original).]

The *Mass* Court further stated:

. . . We are satisfied that *Justice* properly concluded that knowledge of the amount of a controlled substance is an element of the crime of conspiracy to deliver a controlled substance, and that this holding is consistent with a correct interpretation of our controlled substance and conspiracy statutes. . . . The fact that *Justice* required the prosecution to establish the statutory charged amount is fully consistent with requiring the prosecution to prove which delivery offense a defendant conspired to violate and with the fact that conspiracy is a specific intent crime. [*Mass, supra* at 633-634.]

The Supreme Court also relied on *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), and concluded that “the jury should have been instructed that it could not find [the] defendant guilty of conspiracy to deliver 225 grams or more, but less than 650 grams of cocaine unless it found [the] defendant conspired to deliver, not just any amount of cocaine, but at least 225 grams.” *Mass, supra* at 639. The trial court’s failure to so instruct the jury constituted error requiring reversal. *Id.* at 640-641.

Applying *Mass* to the case at bar, we reverse defendant’s conviction of conspiracy to deliver 225 grams or more but less than 650 grams of cocaine. We remand for either entry of a conviction consistent with the jury verdict, i.e., conspiracy to deliver less than 50 grams of cocaine and for sentencing on that offense, or alternatively a new trial on the original charge, at the prosecutor’s discretion. Because our resolution of defendant’s other issues on appeal are not implicated by *Mass*, we continue to adhere to our prior opinion and affirm defendant’s other convictions for the reasons stated therein.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Michael J. Talbot
/s/ Patrick M. Meter